E & L Plastics Corp. *and* Steven D. Zidek *and* John Laut. Cases 30–CA–10725 and 30–CA–10725–2

January 14, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On July 29, 1991, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed together an answering brief and a brief in support of the judge's decision.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified below and to adopt the recommended Order.

The judge found that the Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining a pension and profit-sharing plan which excluded from eligibility members of a collective-bargaining unit. Finding that the plan was announced to employees during the midst of the union campaign and shortly before the Respondent's antiunion speech, the judge concluded that the language of the plan was intended to discourage union activity. We adopt the judge's conclusion that the plan unlawfully limited eligibility to nonbargaining unit employees, but we do so only for the following reasons.

The Respondent's employees attended their first union organizational meeting, at which cards and literature were distributed, on December 20, 1988.[3] The judge found that Esser, the Respondent's president, first learned of the union activity in early January 1989. The Respondent's ''Handbook of Corporate Policies,'' which was distributed to employees on January 9, 1989, included in pertinent part the following provision:

> *Pension*: We have a 401-K Pension and Profit Sharing Plan available to all employees age 21 and over with a minimum of 1 year of service, except those who are members of a collective bargaining unit. . . .

The uncontroverted testimony, corroborated by documentary evidence, does not support a finding that the Respondent prepared or implemented either its plan or the relevant eligibility language in order to discourage union activity. On May 6, 1988,[4] the Respondent's board of directors resolved to establish a retirement plan. On October 31, the Respondent presented to its board of directors a plan that was proposed by its outside consultant. The proposed plan, which was drafted and sent to the Respondent for review well before the commencement of union activity in December, included the following provision:

> Eligibility: Recommended that all employees age 21 and over, except those who are members of a collective-bargaining unit, with a minimum 1 year of service be eligible.[5]

On November 3, the Respondent resolved to adopt the proposed plan subject to a change in the effective date of coverage and to certain minor revisions; final adoption of the plan required the approval of the consulting firm, which would also serve as the plan's administrator. At a meeting held on December 8, a representative from the consulting firm discussed the basic provisions of the plan with the Respondent's employees. After receiving notice in late December that the plan had been approved, the Respondent inserted information about the plan, including its eligibility requirements, into the handbook that was being prepared for the employees. The handbook was distributed to the employees on January 9, 1989, shortly after its completion. Based on the above, we find that the plan's eligibility language was proposed, adopted by the Respondent, and discussed with the Respondent's employees prior to any union activity. We therefore reject the judge's finding that the implementation of the pension and profit-sharing plan was timed to coincide with the Respondent's antiunion speech and was part of an effort to undermine union activity.

[1] The Respondent filed a motion to strike the General Counsel's brief in support of the administrative law judge's decision in its entirety and portions of the answering brief. The General Counsel filed a response in opposition to the Respondent's motion. After reviewing the parties' submissions, we deny the Respondent's motion to strike the General Counsel's brief in support of the judge's decision. However, we grant the Respondent's motion to strike the gratuitous and inflammatory characterizations of the Respondent and its counsel in the General Counsel's brief.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Additionally, the Respondent asserts that the judge's findings are a result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit.

[3] Although employee LaJoice contacted the Union in early December, there is no evidence of any overt union activity prior to the December 20 meeting.

[4] All dates are in 1988 unless otherwise indicated.

[5] The judge's decision contains some suggestion that the relevant eligibility language was not in fact prepared by the Respondent's consultant. The proposal is in evidence, and the General Counsel has presented no reason to question its authenticity. Moreover, what is relevant for purposes of analysis is that the language was prepared and adopted by the Respondent prior to the union campaign, and not who actually drafted the language.

We find, however, that the pension and profit-sharing plan as presented in the Respondent's handbook unlawfully conveyed to employees the impression that they would automatically lose retirement benefits if they were ever to choose union representation. There is nothing in the record to dispel the message that the loss of benefits would be the necessary result of choosing union representation. See *A. M. F. Bowling Co.*, 303 NLRB 167, 170 (1991) (respondent unlawfully maintained a severance plan excluding from eligibility employees who were members of a bargaining unit). Accordingly, we agree with the judge's conclusion that the Respondent violated Section 8(a)(1) of the Act by promulgating and maintaining a pension and profit-sharing plan limited to nonbargaining unit employees. Based on our rationale, and contrary to the judge, we do not find that the unlawful maintenance of the plan is an element of the General Counsel's prima facie case with respect to the unlawful discharges of employees Zidek, Laut, and LaJoice.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, E & L Plastics Corp., Lannon, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Rocky L. Cole, Esq., for the General Counsel.
Donald J. Cairns, Esq. and *Gerald A. Einshon, Esq.*, of Milwaukee, Wisconsin, for the Respondent.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Milwaukee, Wisconsin, on February 4 through 6, 1991. Subsequently, after an extension of the filing date, briefs were filed by Respondent and the General Counsel. The proceeding is based on charges filed December 12 and 13, 1989,[1] as amended, by individuals Steven D. Zidek and John Laut. The Regional Director's amended, consolidated complaint dated July 27, 1990, alleges that Respondent E & L Plastics Corp., of Lannon, Wisconsin, violated Section 8(a)(1) and (3) of the National Labor Relations Act by promulgating and maintaining a rule which excluded members of a collective-bargaining unit from participating in its pension and profit-sharing plan and by discharging employees Steven Zidek, John Laut, and Peter LaJoice.[2]

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the manufacture and sale of milled plastic and fiberglass parts. It annually ships goods valued in excess of $50,000 from its Lannon facility to other enterprises in Wisconsin that are directly engaged in interstate commerce to points outside Wisconsin. It admits that at all times material is has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Communications Workers of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. CREDIBILITY

In the following review of the record I set forth what I deem to be the relevant, credible evidence and, for the most part, do not discuss testimony of record that I have evaluated but considered to be unreliable or not relevant.

In those circumstances where the General Counsel's and the Respondent's witnesses have given conflicting accounts, I have generally credited the testimony of the employee witnesses who testified in a calm and objective manner and maintained the integrity of their direct testimony under cross-examination. Their testimony was in sharp contrast to that given by Shop Supervisor Russell Oechsner (now plant manager) and Company President Frank Esser, who, under examination by the General Counsel answered with a generally hostile demeanor and with testimony that was replete with assertations by each that: ''I don't know,'' I don't recall.'' The testimony of both of these principal company witnesses was also argumentative and evasive as illustrated in the following examples:

Questions by the General Counsel to Esser:

> Q: But those pipes fell down one time, didn't they?
> A. I don't know.
> Q. You're the president, sir?
> A. I don't know when we run out of toilet paper either. I'm the president.
> Q. Did the pipes that you say were jamming up—did it ever come to your knowledge that they caved in?
> A. I know that one pipe collapsed . . . .

Questions by the General Counsel to Oechsner:

> Q. Isn't it a fact that in January shortly after you became a foreman you went to the office and complaint [sic] to Mr. Esser about Doug Du Quaine doing a poor job; isn't that accurate?
> A. No. I don't—I may have talked about Doug at one time or another, but I don't know what you're talking about.
> Q. Well, let me try to refresh your recollection. Isn't it a fact that Mr. Steve Zidek and Mr. Frank Esser were in Mr. Frank's Esser's office, and you were explaining that Doug Du Quaine was a slow worker; isn't that a fact?
> A. No, I don't.
> Q. Is it possible that happened?
> A. I don't be believe so.
> Q. Did you ever make any complaints or talk to Mr. Esser about Doug Du Quaine's work?
> A. Sure. Yes.
> Q. And you talked about the quality of his work; isn't that accurate?
> A. That I don't know of.
> Q. Well, what did you talk about in terms of his work?

[1] All following dates will be in 1989 unless otherwise indicated.
[2] An allegation regarding one other employee, Robert Herzog, was withdrawn at the start of the hearing and thereafter was dismissed on the record.

A. I don't know. To be honest, I may have said something about—may have mentioned his quality. I may have mentioned that he was slow at one time or another. I don't know. I have no idea.

Q. And you were stealing tools from E & L Plastics?

A. No.

Q. Weren't you taking tools home so you could use them for your milling machine?

A. Can I explain?

Q. No, sir. Were you taking the tools home so you could use them for your milling machine, right?

A. Yes.

Q. And you told that to Mr. Peter La Joice?

A. I don't know.

Q. You don't know. Did you?

A. I don't know.

Q. Did you tell Mr. Steve Zidek?

A. I don't know.

Q. Would fiberglass parts be in competition with E & L Plastics?

A. Yes, that would be.

Q. Did you, in fact, show a blueprint plan to Mr. Steve Zidek before you became foreman regarding a fiberglass part?

A. I don't know.

Early in the General Counsel's examination of the company president, Esser was questioned about the speech he gave to employees and said he read it word for word without deviation. He then testified to using certain language that was not in page 6 of the exhibit given to the Board in response to a subpoena. He was then confronted with a similar exhibit that had an additional handwritten seventh page and he made a motion as if to throw the document at the General Counsel. Esser admitted that he was ''irritated'' by the question and I find that his reaction, as if caught in a deception, displayed a demeanor that reflects adversely on his credibility.

In summation, my overall evaluation of Esser's and Oechsner's testimony reveals answers that are repeatedly equivocal, argumentative, distorted, and contradictory. Under these circumstances, I find that their testimony is inherently untrustworthy and unreliable and, accordingly, I will not credit their testimony where it is in conflict with the credible testimony of other witnesses or where it is otherwise uncorroborated by events, documents, or other testimony.

III. THE ALLEGED UNFAIR LABOR PRACTICES

In 1984, Frank Esser, a self-employed machinist who made plastic parts in his garage, joined with his brother Nick Esser, and Roger Luther, a mutual friend, and formed E & L Plastics as a job shop to manufacture plastic parts. Frank Esser became president, Roger Luther, vice president (and initially, shop supervisor), and Nick Esser, secretary/-treasurer. In June 1989, when several employees were discharged, Russell Oechsner was shop supervisor.

The Company was first housed in a small industrial complex in Germantown, Wisconsin, and had one additional employee. The Company expanded and successively added employees and machinery and moved to larger facilities in both 1985 and 1986, and in February 1988 it moved to its current location. By then it had between 20 and 25 employees but did not have any formal or recognized personnel policies.

Steven Zidek, who is Vice President Luther's nephew, and John Laut were hired in 1985, and Peter Lajoice and Russell Oechsner were hired in 1987.

After the Company moved in February 1988, it failed to install a dust collection system until June, when the system used at the prior facility was moved. This system was inadequate to handle the dust produced by all the new machinery and the material kept jamming up in the pipes and on at least one occasion a pipe collapsed from the apparent weight of the dust. Employees complained about the dust problem and in November 1988, the Company hired a professional installer to replace the system with larger pipes.

A month or two after moving Esser reacted to suggestions of business acquaintances and began gathering examples of personnel policies at other companies. In May he held a board of director's meeting and a decision was made to establish a 401(k) retirement plan. Nick Esser was directed to check into the matter and he ultimately presented a plan to the board at a meeting on October 31, 1988.

Respondent reviewed the plan and made some changes, including change to make the plan effective December 31, 1988, so that it would cover the 1988 calendar year. Final adoption of the plan was made subject to its consultant's approval. However, on December 8, the Company held a meeting with employees and gave them their first explanation of the basic provisions of an anticipated pension plan.

Meanwhile, the Company also began to formulate a handbook of corporate policies and, when its consultant approved the pension plan, the Company in late December finalized its so-called Corporate Policy Handbook, by incorporating a reference to the 401(k) pension and profit-sharing plan. On January 4 or 5, 1989, the Company completed the handbook and purchased the binders for employee copies, and on January 9, 1989, it issued copies of the handbook to employees.

The pension plan (as assertedly proposed by the consultant) contained the following provision regarding eligibility:

> Eligibility: Recommend that all employees ages 21 and over, except those who are members of a collective-bargaining unit, with a minimum of 1 year of service be eligible. One year of service is defined by working 1,000 hours or more.

After the Company's final approval, it inserted into the handbook, the following language regarding pension eligibility:

> *Pension*: We have a 401-K Pension and Profit Sharing Plan available to all employees age 21 and over with a minimum of 1 year of service, except those who are members of a collective bargaining unit.

Esser testified that he did not have the plan reviewed by any attorney and that the Company merely accepted the language proposed by the consultant.

Meanwhile, in the fall of 1988, a number of employees, including Oechsner, Zidek, Laut, LaJoice, and others had began to discuss their concerns about dust and ventilation problems as well as job safety, pay, and profit sharing and, in December, the poor performance of the new shop supervisor, James Enott. Enott had come to the Company from another business after Roger Luther who acted as the Company's shop supervisor, complained to Esser that the job of

shop supervisor was causing him personal problems and was too stressful, that he could not sleep, and that the job was ''getting to him.'' Luther testified that in November he asked to be relieved from the supervisory position because he could not discipline employees, he did not know how, and because he had too much work involving special projects.

Oechsner admitted that when Enott was hired he become upset with Supervisor Enott's performance and also was upset that Esser had hired ''somebody outside the Company that didn't have experience with the kind of work we were doing.'' As a result of the employees' group discussions and shortly after they were exposed to the new supervisor's performance, ''everyone'' decided they needed a union and ''should go for it.'' In early December LaJoice got the telephone number of Union Business Agent Peter Messe from Steve Zidek's father (Roger Luther's brother-in-law), who had been a president of the local Communications Workers Union for over 16 years. (Luther admitted he knew Zidek's father had been a union president). LaJoice initiated the union action specifically because of Zidek's family relationship to Vice President Luther, Luther's knowledge of Zidek's father's union activities with the Communications Workers, and Zidek's concern that the blame for the union activity would fall on him.

LaJoice set up a union meeting at his home to take place on December 20, and he informed other employees, including Oechsner. Oechsner was described as gung-ho for the Union and he told everyone he would attend but did not do so. At this meeting, Union Representative Messe, from the Communications Workers, asked questions about why they wanted a Union and then handed out union literature and authorization cards. Zidek, Laut, and LaJoice became the ''in-plant organizing committee'' and after the Christmas and New Year holidays LaJoice and Zidek began to get union authorization cards signed during the lunch hour at work. Laut also was helping in the union organizing by spreading the word about the Union. Laut identified Oechsner, Duquaine (who was a close friend of Oechsner), Robert Herzog, Tod Laloney, Zidek, and LaJoice as employees in the machine area who he ''talked the union up'' to. He also tried talking to Dave Checolinski but was told he ''didn't want nothing to do with it.'' Duquaine and Oechsner each signed a union authorization card on January 3, 1989.

Esser testified that second-shift employee Lewis Martinez told him about the union organizational attempt around the beginning of the year. He also said that Martinez complained about being harassed by the Union,[3] saying that LaJoice had asked him to solicit authorization card signatures on the second shift, and that he had at first refused but then did so after Lajoice repeated the request.

Oechsner admits that few days after signing an authorization card he told Esser that he and others had signed cards, Esser told him to get it back. Esser contacted his attorney and then told Oechsner that he had the legal right to get it back and Oechsner (and his friend, Duquaine) then asked LaJoice for their cards. LaJoice initially refused but said he would destroy the cards and did not return them.

During this same period of time Oechsner made arrangements with Esser for Respondent to purchase (for $3000) a milling machine that Oechsner had acquired and was using in his garage after work for the independent production of milled products.

On Thursday, January 12, Esser, who said he was ''disappointed'' about the union activity, made a speech to all the employees in which he forcefully spoke against any Union and specifically mentioned harassment by the Union and told the employees that they had the legal right to get their authorization cards back.

Zidek testified that on January 9, LaJoice told him that something funny was going on because Oechsner was asking for his card back. Then, a few days before the meeting and Esser's speech, Esser and Luther called Zidek into Luther's office. Zidek was told by Esser that is was hard to do but he was going to have to let Zidek go because of his bad attitude and his influence on others. Esser admitted he had no problems with Zidek's work and after a long discussion about working conditions and profit sharing and raises, Esser finally said he was just going to let things go and see what happens. Esser gave his speech a few days latter and the union organizational activity ceased and never resumed.

The following Monday, January 16, Respondent promoted Oechsner to the position of shop supervisor.

Oechsner asserts that during the next several months LaJoice, Zidek, and Laut were uncooperative and unproductive employees and he repeatedly communicated complaints in this respect to Esser. Despite these asserted problems, Zidek was transferred from his regular skilled work operating a computerized milling machine to a position as inspector, Laut was given additional duties and made responsible for the toolroom, and LaJoice continued his regular job running a milling machine and he received no warnings or discipline regarding any work problems. LaJoice testified, however, that his relationship with Oechsner began to deteriorate and he believed that Oechsner began to continually harass him on the job. He described an example of being assigned a job at 2:30 p.m. that had to be out the next day. LaJoice told Oechsner that the job is normally run on the faster, computerized CNC machine (that LaJoice was not experienced with), and that his machine wasn't fast enough to get it out in a day. Oechsner still gave him the job and the next day accosted him on four separate occasions and asked if the job was done and what was holding it up. At 2 p.m. Oechsner, who is several inches and pounds smaller the LaJoice, got right up in LaJoice's face, put his hand on LaJoice's chest, and told him: ''If you can't get the job done get your ass the hell out'' and ''If you can't do it maybe you ought to go home or find another job.'' LaJoice finally yelled at Oechsner to ''get the fuck out of my face and let me get to work.'' Oechsner made some comments under his breath and walked away and LaJoice went over to Esser, when he was seen watching them from a distance, and complained about Oechsner's harassment. LaJoice was never warned or disciplined over the incident and received a 50-cent-an-hour raise shortly thereafter. On one other occasion, however, Oechsner fired an employee for insubordination 1 day after the event occurred and Respondent's records showed that

[3] I do not credit this testimony to the extent that it is a fact that Martinez used this word. Rather, inasmuch as Martinez was not called to corroborate Esser, I conclude that the so called harassment was a conclusion reached by Esser to adversely describe the Union's second request that Martinez solicit authorization cards on the second shift.

other employees had occasionally received discipline for safety and other reasons.

Respondent presented some evidence regarding ''horseplay'' by the alleged discriminatees but it was admitted that Oechsner himself and other employees had also engaged in horseplay and that no one had ever been fired or disciplined for that reason.

Oechsner did not recall seeing any of the alleged discriminatees at his wedding on June 10 but admitted that they were sent an invitation sometime in April.

The week prior to his wedding Oechsner became ''extremely upset'' (no specific reason was identified), went to Esser, and told him:

> That's it. I can't handle it anymore. Either these four guys go, or take me off of supervision. I don't want anything more to do with it.

Oechsner also testified that

> I told him I was sick and tired of it, so he had to make the decision. I wanted to get rid of those guys, and that was going to be final. Something had to happen then.

Esser told him to calm down and to wait until after his honeymoon was over. When he returned Esser told him he had decided and that Oechsner could get rid of the people under the condition that he wait until payday and that they be told it was a layoff so they could collect unemployment.

Oechsner told each one that it was hard for him to do it but they were being laid off for lack of work (which was not in fact the case), that he would give them good references, and that they were good workers. Laut and LaJoice were terminated on June 22 (payday Thursday) and Zidek's job ended the following Monday when he returned from vacation.

IV. DISCUSSION

The principal issues in this case arose several months after an abortive union organizational campaign, when three union activists were told they were being permanently laid off.

The Respondent first contends that the allegation regarding the admitted discharge of Peter LaJoice should be dismissed because it is untimely under Section 10(b) of the Act. Respondent also contends that there is no evidence of knowledge by the Respondent of union activity on the part of alleged discriminates Laut and Zidek.

With respect to Respondent's 10(b) argument, it is clear that the charges regarding Laut and Zidek were timely filed within the 10(b) period and, as it otherwise is shown that the legal and factual allegations concerning LaJoice arose out of the same matters and are closely related, if not identical, to the other pending charges. The Regional Director properly exercised his discretion in consolidating the LaJoice charge with the earlier and timely filed Laut and Zidek charges and no valid basis exists for finding that the LaJoice charge is not properly a part of this proceeding. Accordingly, Respondent's request for dismissal of the latter charge is denied.

In connection with the issue of knowledge, Respondent, by letter dated May 15, 1991, filed a pleading entitled ''Citation of Supplement Authority,'' in which it cites the case of *Amelio's*, 301 NLRB 182 (1991), and noted that it appeared in the May 6, 1991, edition of the Labor Relations Reporter. By motion dated May 17, 1991, the General Counsel moves to strike Respondent's citation as being untimely and an improper reply brief which treats an issue addressed in its original brief, the issue of Respondent's knowledge of concerted activity.

The General Counsel's motion is granted inasmuch as the citation is irrelevant to these proceedings. Here, I find that the matter of Respondent's knowledge of Laut's and Zidek's union activities is clearly shown to have been within the personal experience and knowledge of Shop Supervisor Oechsner in December 1988, and January 1989 (when Oechsner was an employee who acted in concert with the others in discussions and in signing an authorization card), and again in April and May 1989, when Oechsner recommended and then executing their discharges at President Esser's direction. It other is clear that Esser knew of the union activity in early January 1989, when he made his antiunion speech, a speech which effectively stopped any further organizational activity.

It also is clear that Oechsner contemporaneously abandoned his initial support for the Union and pursued his own agenda which included the profitable sale of a $3000 machine to the Respondent and his promotion to shop supervisor. Although several months went by before any action was taken against the union organizers, these months were occasioned by a series of conflicts between Supervisor Oechsner on the one hand, and on the other, his former fellow employees and I find that there is ample evidence to show that Oechsner not only had knowledge of their past union activities but also harbored a distrust or resentment toward them because of his awareness of his own brief role in their past concerted action against management (a management he was now part of), and what he perceived to be their seeming failure to accord him appropriate deference in his new position. It also appears that he saw their continued presence on the work force to be a potential threat to future concerted activity that could affect his position as shop supervisor and that he communicated these feelings to Esser. It is well established that the motive and the knowledge of a supervisor whose recommendation plays a part in an employment termination decision is imputable to the employer, see *JMC Transport v. NLRB*, 776 F.2d 612, 619 (6th Cir. 1985), and case cited therein. Accordingly, I find that the Respondent had knowledge of the union activities of each of the three alleged discriminatees. In a discharge case of this nature, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employees' union or other protected, concerted activities were a motivating factor in the employer's decision to terminate them. Here, the record shows that the Respondent had direct knowledge of the Union and concerted activities of these three alleged discriminatees.

Although Oechsner had initially supported his coworkers and had signed an authorization card, he told President Esser about employees signing union authorization cards and acting upon Esser's advice (obtained after consultation with an attorney), and sought to have his signed authorization card returned. Esser also was told about the Union in early January 1989 by employee Martinez. Esser then spoke to Zidek about letting him go because of his ''bad attitude'' and influence on others and made an antiunion speech to employees on

January 12 which effectively ended the organizational attempt. Oechsner was immediately promoted to a position as shop supervisor and the Company also purchased his milling machine for $3000. Two months latter in March 1989, Oechsner had a casual conversation with former employee Scott Navin and told him about becoming ''foreman'' and then told Navin:

> the guys tried getting in a union in at E & L Plastics but it didn't seem to work, so the company was looking for a way to get rid of them.

Navin was invited to and attended Oechsner's wedding in June. When asked questions relating to Navin's testimony, Oechsner repeatedly answered that he didn't recall. LaJoice confirms that Navin told him about the conversation with Oechsner about a month after it occurred when they had a chance meeting.[4] Navin said he considered himself a ''friend'' of all the employees, including Oechsner, but only saw them by chance after he stopped working at Respondent's facility.

Under these circumstances, I find Navin to be a completely independent and credible witness (who otherwise had nothing to gain by his testimony) and I find that he accurately testified that in March 1989, approximately 2 months before the alleged discriminatees were fired, Oechsner told him that some unnamed ''guys'' has tried to start a union and that the ''company'' was ''looking for a way to get rid of them.''

As noted, Esser made a strongly antiunion speech only a few months before and I find that both Esser and Oechsner (who was having perceived difficulties in his new supervisory relationship with his former fellow employees), retained an attitude of animus towards the three principal union activists that persisted through March and into April and May. I further find that this animus is sufficient to support an inference that the past union activities of employees LaJoice, Laut, and Zidek were a motivating factor in Respondent's subsequent decision to terminate them.

This conclusion is reenforced by the Respondent's earlier action in implementating and distributing its pension and profit-sharing plan on January 9, shortly before Esser prepared and presented his antiunion speech to the employees. The obvious effect of Respondent's language, which specifically denies profit sharing to ''those who are members of a collective-bargaining unit'' and which was announced during the midst of a union campaign, is to illegally discourage union activity, see *Fabric Warehouse*, 294 NLRB 189 (1989).

Respondent, however, asserts that it made a mere ''technical violation'' of the Act which was ''immediately'' corrected after it was so notified by the General Counsel, and argues that the matter is de minimis and that the allegation should be dismissed.

First, it is noted that the described provision went into effect during the height of a union campaign when the company president was contemporaneously obtaining legal advice concerning his antiunion speech, and the offensive denial of profit sharing to collective-bargaining unit members was made at the same time Respondent emphatically was instructing employees about their ''legal right'' to withdraw any union authorization cards they had signed. The employees were required to sign an acknowledgement that they received this handbook in January 1989. However, the improper language was not deleted until February 2, 1990, and then only after the amended charge was filed. Secondly, I find that the timing of the dissemination of the pension and profit-sharing plan just before Esser's antiunion speech demonstrate a particularly flagrant (and, in this instance, effective), example of coercive interference in employees' Section 7 rights under the Act. Accordingly, I find that the General Counsel has independently shown that Respondent has violated Section 8(a)(1) of the Act in this respect, as alleged.

Under all these circumstances, I find that the General Counsel has met his initial burden by presenting a prima facie showing, sufficient to support an inference that the employees' union activities were a motivating factor in Respondent's subsequent decision to terminate them. Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth in *Wright Line*, 251 NLRB 1083 (1980), see *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), to consider Respondent's defense, and whether the General Counsel has carried his overall burden.

Respondent's defense in this regard is based on its contention that all three employees were discharged for performance deficiencies and poor work attitudes unrelated to union or other protected activity.

I find no persuasive evidence to support Respondent's defense and I conclude that its alleged reasons are pretextual and merely designed to mask the fact that each termination was motivated by Supervisor Oechsner's belief that Esser wanted to get rid of any threat to possible renewed union activity; by his own desire to purge the workplace of reminders of his own changing role regarding the union organizational attempt (reinforced by his apparent difficulties in effectively exercising supervisory skills over his former fellow employees); and by Esser's dislike for handling employee relations matters, and his willingness to encourage or accept a solution that would eliminate the threat of any renewed union activity.

Esser consistently demonstrated a dislike for any personal involvement in his Company's employee relations matters, a dislike that is shown to be consistent with the General Counsel's contention that Respondent wanted to rid the company of the three union organizers that had created irritating supervisory problems. Esser was led to believe by reports from Oechsner that these same employees were displaying ''attitude'' problems. It is not necessary to determine that Esser actually initiated the discussion to discharge the three inasmuch as he clearly endorsed Oechsner's recommendation to this end. It is clear that he made no meaningful, objective investigation of Oechsner's charges against these employees, and did not make any attempt to resolve the so-called problems by seeking to come up with some less drastic solution short of termination (except for a talk with Zidek). Accord-

[4] Navin had formerly worked for the Respondent as a mill machine operator with Oechsner (and had helped Oechsner get the job). Navin voluntarily left Respondent in December of 1988. Navin lives in the same small community with Oechsner and they occasionally see each other at various bars, bowling alleys, and parks, and from time to time at Carl's gas station, where the quoted conversation took place.

ingly, and for the reasons further discussed below, I find that LaJoice, Laut, and Zidek would not have been discharged were it not for their involvement in the abortive union organization attempt and that the reasons advanced by Respondent to rationalize each discharge are unfounded and pretextual.

The three discriminatees were long-term employees who had no history of poor work or attendance habits and no record of past warnings or discipline, yet, in the several months that followed the demise of the union organizational attempt and the contemporaneous promotion of Oechsner to be their supervisor, they were suddenly accused of numerous faults including slow work, engaging in horseplay, and having bad attitudes.

There is no indication that anyone had ever been fired for horseplay by Respondent, even though it was a common occurrence in the plant. Oechsner admitted that he personally had greased machine handles and was in water fights and wrestled at work. Further, current supervisor, David Checolinski, testified that when he was an employee, he and Doug Duquaine, after ''rough-housing'' on worktime, got into a fight observed by Oechsner (when he was a supervisor), and they received no discipline. A discharge based on common horseplay, occurring on a regular basis at an employer's facility, which had not previously been cause for even minor discipline, is not a valid defense, see *Crossroads Furniture*, 301 NLRB 520 (1991), and I find that this asserted justification is merely pretextual.

Respondent attempted to support its allegations by calling Supervisor Checolinski, who testified with general negative comments about the slow and deficient work performance of Laut, LaJoice, and Zidek. Checolinski was not a supervisor at the time of his alleged observations and he never told anyone in management about it until he told Respondent's counsel prior to the trial. Accordingly, his observations could not have been part of the reason for the discharges. Otherwise, it was shown that Oechsner also complained to Esser about his friend Duquaine and his slowness and poor quality. Duquaine was not disciplined and he, along with all the other employees, including LaJoice, Laut, and Zidek got a pay increase in May.

Although Esser said he believed Laut had been slow since he was first hired in 1985, he had not been warned or disciplined. To the contrary, he was given additional duties in the toolroom (duties which occasioned constant interruption at his machine so he could issue tools to others). Then, he was discharged because his production slowed.

Esser testified that he had documentation that would support his claim that the Company had thousands of dollars worth of damaged or deficient parts that were rejected by its customer because of alleged inspection failures by Zidek, yet no corroborating evidence was produced. Otherwise, it appears to be inherently unbelievable that Respondent would transfer Zidek in January from his skilled work adjusting and running the computerized ''CNC'' machine (for which he had been sent for special schooling), and then do nothing for several months as he repeatedly failed to properly make inspections, without otherwise specifically and directly addressing the alleged problem.

Vice President Luther admitted that Zidek was one of the better employees ''for quite a time'' and was one of the highest paid, but he asserts that Zidek developed a ''bad attitude.'' This type of self-serving declaration, as also attempted by Esser and Oechsner, is neither objective, conclusive, nor persuasive. Compare *Eskaton Sunrise Community*, 279 NLRB 68, 80 (1986). In addition to being self-serving, Respondent's several attacks against Laut, LaJoice, and Zidek basically are merely selective or anecdotal, unsupported by any ''hard'' or objective information, such as production records.

With the exception of his one discussion with, Zidek, Esser is not shown to have made any independent investigation of the alleged work performance problems or attitude deficiencies relayed to him by Oechsner. In the latter case the record shows that Zidek was called in April and told by Esser that he was going to be let go, because he wasn't doing his job because he walked around the shop, talked to people, interrupted their work, and had become a bad influence on everyone. Zidek was then given another chance to ''do your work properly'' and no written warning or other discipline was issued. No evidence was persuaded to show specifically what Zidek did after April that would justify his discharge and, in fact, it appears that Respondent's alleged reason's for Zidek's termination shifted to problems with his inspections that occurred prior to the April meeting with Esser.

Under these circumstances, I find the Respondent's stated reasons regarding poor work performance are not supported by credible evidence and otherwise are clearly pretextual. Accordingly, I conclude that the Respondent has failed to show that either Laut, LaJoice, or Zidek would have been discharged absent their union activities. The General Counsel otherwise has met its overall burden of proof and I further conclude that Respondent's discharge of these three employees is shown to have been in violation of Section 8(a)(1) and (3) of the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By promulgating and maintaining a rule which excluded members of a collective-bargaining unit from participating in its pension and profit-sharing plan, Respondent has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act and thereby has engaged in unfair practices in violation of Section 8(a)(1) of the Act.

4. By discharging employees John Laut and Peter LaJoice on June 22, 1989, and Steven Zidek on June 26, 1989, respectively, Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, it is recommended that the Respondent be ordered to cease and desist therefrom an to take the affirmative action described below which is designed to effectuate the policies of the Act.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to reinstate each of the three discriminatees to their former job or a substantially

equivalent position, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered because of the discrimination practiced against them by payment to the a sum of money equal to that which they normally would have earned form the date of the discrimination to the date of reinstatement, in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1989),[5] and that Respondent remove from its files any reference to the discharge, and notify them in writing that this has been done and that evidence of this unlawful discipline will not be used as a basis for future personnel action against them.

Otherwise, it is not considered to be necessary that a broad order be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, E & L Plastics Corp., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining a rule which excluded members of a collective-bargaining unit from participating in its pension and profit sharing plan.

(b) Discharging any employee for activity protected by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer John Laut, Peter LaJoice, and Steven Zidek immediate and full reinstatement and make them whole for the losses they incurred as a result of the discrimination against them in the manner specified in the remedy section of this decision.

(b) Remove from its files any reference to these discharges and notify them in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions against them.

(c) Rescind, if it has not already done so, any rules which exclude members of a bargaining unit from participating in its benefit plans.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Lannon, Wisconsin facility, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge any employee for engaging in activities protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL NOT promulgate and maintain any rule which excluded members of a collective-bargaining unit from participating in our pension and profit-sharing or other benefit plans.

WE WILL offer John Laut, Peter LaJoice, and Steven Zidek immediate and full reinstatement and make them whole for the losses they incurred as a result of the discrimination against them.

WE WILL remove from its files any reference to these discharges and notify them in writing that this has been done and that evidence of the unlawful discharge will not be used as a basis for future personnel actions against them.

WE WILL rescind any rules which exclude members of a collective-bargaining unit from participating in our pension and profit-sharing or other benefit plans.

E & L PLASTICS CORP.